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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 249

HAROLD C. FULLER, *Petitioner,*

v.

STATE OF ALASKA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

PETITIONER'S REPLY MEMORANDUM

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Respondent does not deny that this Court has power to grant certiorari to review the judgment of the Supreme Court of Alaska in this case—a judgment based on the now discredited authority of *Schwartz v. Texas*, 344 U.S. 199. But respondent urges that the time period established by the Court's rules be strictly enforced against petitioner—although its Brief in Opposition was also filed out of time—because petitioner has failed to comply with the terms of his bail bond. We fail to see that this circumstance is material.[1]

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[1] Nor, apparently, did respondent, until faced with *Lee v. Florida*, for it did not call this circumstance to the attention of the Supreme Court of Alaska.

Although respondent asserts that petitioner "illegally" left its jurisdiction (Opp. p. 2), Alaska law does not appear to impose sanctions beyond forfeiture of the bail bond;[2] moreover, it is an essential element of the federal offense defined in 18 U.S.C. § 1073 (Opp. p. B-1) that the defendant have the "intent to avoid confinement"—an intent which cannot be assumed, for petitioner's conviction is not final. In any event, if petitioner has broken any law, it would define its own sanctions—and denial of certiorari would not be one of them.

Moreover, while there are cases in which this Court has declined to decide a case where it was evident that the defendant would not submit to an adverse decision,[3] respondent understandably places no reliance on them. Petitioner has not permanently removed himself from the authority of the United States nor otherwise manifested an unwillingness to comply with a final judgment of conviction. As respondent knows, petitioner is in the Republic of VietNam (see Opp. p. 1), where the United States is not without authority or resources to compel his return. Indeed, counsel understand that petitioner is working there for the United States, and have recently received

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[2]It is stated in the Bench Warrant reproduced at Opp. p. A-1 that respondent has charged petitioner "with the crime of failure to appear pursuant to Notice to Produce in violation of . . . ." (The reference to the Alaska statute is also blank in the original of the Warrant.) Research has uncovered no Alaskan statute establishing the "crime of failure to appear pursuant to Notice to Produce." In the complaint reproduced at Opp. p. B-1, reference is made to Alaska Statutes 11.15.150, but this is the provision defining the crime for which petitioner has been convicted in the present case.

[3]*Eisler v. United States*, 338 U.S. 189, 338 U.S. 883; *Bonahan v. United States, Nebraska*, 125 U.S. 692; *Smith v. United States*, 94 U.S. 97.

communications from petitioner sent from an A.P.O. address.[4]

On the merits, respondent reasserts "that no violation of Sec. 605 of the Federal Communications Act is involved," (Opp. p. 3), and declares that this was "demonstrated" by the concurring opinion below. However, since the majority of the Supreme Court of Alaska decided the case on a broader ground, the concurring Justice deemed it unnecessary to elaborate upon his conclusion that § 605 had not been violated (Pet. p. A-10). It therefore bespeaks no disrespect to insist that his views cannot be regarded as dispositive. Nor, of course, would the grant of certiorari decide the point in petitioner's favor. The relief sought in the Petition (pp. 8-9) is for a remand to the Supreme Court of Alaska for reconsideration in light of *Lee v. Florida*—in other words, for a determination whether evidence was introduced against petitioner in violation of § 605.

Respondent urges alternatively that petitioner's conviction should stand despite *Lee*, because his "trial was completed thirty-eight (38) months earlier." (Opp. p. 3). We submit that the cases on which respondent relies are plainly inapposite. There is no reason to believe that violation of § 605 in state court prosecutions has been so pervasive that retroactive application of *Lee* "would seriously disrupt the administration of our criminal laws," *Johnson v. New Jersey*, 384 U.S. 719, 731; *Stovall v. Denno*, 388 U.S. 293, 300. Contrast the potential impact of the overruling decisions discussed in *Stovall*, 388 U.S. at 299-300. Moreover, there is absent here an element strongly emphasized in *Stovall, id.* and *Johnson v. New Jersey*,

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[4]Since respondent has presented facts outside the record, our reply must be based on the facts which counsel are able to represent. In this regard we wish to make clear that since counsel lack physical custody of petitioner, we cannot represent that he will voluntarily return to Alaska.

384 U.S. at 727, for the ruling in *Lee v. Florida* was clearly foreshadowed by prior cases. As the *Lee* opinion explains (392 U.S. 378 at 385), once *Benanti v. United States*, 355 U.S. 96, had been decided, "the only remaining support" for *Schwartz v. Texas, supra*, was *Wolf v. Colorado*, 338 U.S. 25; and that "doctrinal underpinning of the *Schwartz* doctrine was, of course, completely removed by *Mapp v. Ohio*, 367 U.S. 643." After *Mapp* at the latest, the states could no longer rely on the continuing validity of *Schwartz* in obtaining or introducing evidence in criminal prosecutions. Accordingly, we submit that *Lee* is so plainly entitled to full retroactive effect that although the issue is important, further argument on the point seems unnecessary. Compare *Daegele v. Kansas*, 375 U.S. 1; *Doughty v. Maxwell*, 376 U.S. 202; *Jackson v. Denno*, 378 U.S. 368. On the other hand, there is no instance in which this Court has held without plenary consideration that one of its decisions should be *denied* retroactive effect. Accordingly, if the issue raised by respondent is deemed to have substance, certiorari should be granted, with direction to brief it, as in *Tehan v. Shott*, 381 U.S. 923.

Respectfully submitted,

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